IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2659 OF 2004

IN

SUIT NO. 1711 OF 1994

Raja Construction Co. ..Plaintiffs

versus

Romesh S. Sharma ..Defendant

Mr. O. A. Siddiqui i/b. Lilani Shah & Co. for the Plaintiffs.

Mr. R. Narula i/b. J. Narula & Associates for the Defendant.

CORAM : D. G. DESHPANDE,J.

DATE : 15H DECEMBER,2004.

P.C. :

1. Heard learned counsel for the parties. This is defendant's notice of motion for dismissal of the suit as it is not maintainable and for discharging the Court Receiver as a consequences thereof.

2. The main contention of the defendant is that the suit is filed by the plaintiff in 1994, to be precise, on 22.4.1994, but admitted by the court on 25.4.1994.

3. This notice of motion for dismissal of the suit for want of jurisdiction is taken out by the defendant in 2004 i.e. after 10 years of the filing of the suit and when they had filed written statement. In the affidavit in support of this notice of motion, it is stated that subsequent to the filing of the written statement the defendant caused enquiries to be made in the office of the Registrar of Firms at Mumbai and Assistant Registrar of Firms by their letter dated 12.3.2004 confirming that the firm of the plaintiff is not registered with them. They annexed at Exhibit 'A' the said letter in support of their contention. Therefore now according to the plaintiff and in view of Section 69 of the Partnership Act the suit is not maintainable as the partnership firm of the plaintiff was not registered and the plaint should be rejected.

4. On the other hand counsel for the plaintiffs contended that prior to 1.4.1977 Narendra V. Bhatia was carrying on business in the firm name and style of Raja Construction as a sole proprietor from Kandivali. Then there was a Deed of Partnership dated 25.10.1977 between himself on the one part and Smt. Pushpa V. Bhatia on the other part and the sole proprietary firm was converted into a

partnership with effect from 1.4.1977, he himself and Mrs. Pushpa V. Bhatia being partners in the firm. It is further stated in affidavit in reply that as required by the Indian Partnership Act he himslef and Smt. Pushpa Bhatia singed and executed an application for registration of the firm in Form 'A' on 7.11.1977 indicating therein that the firm of M/s. Raja Construction has been constituted with effect from 1.4.1977 and this application was submitted to the Registrar of Firms on 1.12.1977 and the application was accepted for registration together with registration fee of Rs.15/- as applicable at that time vide receipt dated 051062 dated 1.12.1977. Further in the affidavit, the plaintiffs have stated that this application dated 1.12.1977 for registration of the firm was submitted by them through their Advocate H. S. Raheja who was a witness and is signatory to the said application and thereafter the plaintiffs were under the impression that the firm had been registered. Then in 2000 a Deed of Amendment to the Partnership came to be executed i.e. on 31.3.2000 whereby Smt. Pushpa Bhatia retired and Shri Amitabh Bhatia was inducted or joined as a partner. Further the Deed of Partnership was executed between the plaintiffs and the said Amitabh Bhatia as per the amendment to the partnership dated 31.3.2000 and 1.4.2003. It is contended by the plaintiff that they also made

enquiries with the Registrar of Firms and because their application of 1977 was very old, they therefore through their C.A's letter dated 9.3.2004 recorded that the plaintiffs had applied for registration of the firm on 1.11.1977 but had not received any communication and asked for issuance of a certificate of registration of firm and because the matter was old, they furnished fresh copies of the documents along with Form 'A' and consequently Registrar of Firms issued certificate of registration dated 12.7.2004 as per Exhibit '5' to the reply.

5. In this background and in view of the reply in detail, counsel for the plaintiffs contended that the suit cannot be dismissed as alleged by the defendant and since the defendant have raised objection after ten years of filing of the suit and in view of the pleas raised by the plaintiffs, this matter can be decided at the time of evidence i.e. final decision of the suit and no relief can be granted to the plaintiffs. At this juncture counsel for the defendant also pointed out that right from 1977 they have been submitting income tax returns in the name of partnership firm Raja Construction and he submitted assessment order of 1978-79 and 1983-84 passed by the Income Tax Department in favour of the plaintiffs firm as a registered firm.

6. Counsel for the defendant relied upon the judgment of the Supreme Court reported in **AIR 1971 S.C. 1015 Commissioner of Income Tax, Andhra Pradesh, Hyderabad vs. M/s. Jayalakshmi Rice and Oil Mills Contractor Co.** and also relied upon the judgment of Supreme Court reported in **(1998)7 S.C.C. 184 Raptakos Brett & Co. Ltd. vs. Ganesh Property**.

7. In the Judgment of the Supreme Court reported in AIR 1971 Supreme Court 1015, as referred above, the Supreme Court in paragraph 4 has considered the question, viz. whether the registration of a firm under the Partnership Act takes place with effect from the date on which the application for registration is made in accordance with Section 58 of the Act, which process for registration of firm may be effected at any time by sending by post or delivering to the Registrar of the area .....statement in the prescribed form and accompanied .....stating". The Supreme Court further observed that: **" Under Section 59 when the Registrar if satisfied that the provisions of Section 58 have been duly complied with he shall record an entry of the statement in a register called the "register of firms"** and shall file the statement. The Supreme court has held that

Section 58(1) is not to be read in isolation and has to be considered along with the scheme of the other provisions of the Act. As regards the other judgment of the Supreme Court reported in 1998(7) S.C.C. 184 Raptakos Brett & Co. Ltd. vs. Ganesh Property, referred to above, and relied upon by the Counsel for the Defendantm, in that case the issues before the Supreme Court were (1) Whether the suit filed by the respondent was barred under Section 69 (2) of the Partnership Act, either wholly or in part, and (2) If the suit was so barred whether subsequent registration of the plaintiffs firm could revive the suit to make it competent atleast from the date of which such registration pending the suit was obtained by the respondents firm. In that case while interpreting Section 69(2) of the Partnership Act, the Supreme Court observed that : **"It is true that it is a penal provision which deprives the plaintiff of its right to get its case examined on merits by the court and simultaneously deprives the court of its jurisdiction to adjudicate on the merits of the controversy between the parties. It is also true that once on such construction of this provision, the bar under section 69(2) of the Act gets attracted, then the logical corollary will be that such provision being mandatory in nature would make the suit incompetent on the very threshhold.**

8. There cannot be any dispute about the proposition and observations of the Supreme Court. However, the question in the instant case is whether the suit firm was registered on the date of filing of the suit. I have already noted the facts of the case, and, therefore in my considered opinion the objection by the defendant after 10 years of the filing of the suit under Section 69(2) in the background of the facts, noted by me in paragraph 4 above, has to be tested at the time of the trial. Because it is only after the evidence is adduced by the parties that the court can come to the conclusion whether objection under Section 69((2) has to be accepted or rejected.

9. In the result, I pass the following order :

ORDER

Objection regarding maintainability of the suit for want of registration requires evidence. The same will be decided at the time of trial. Notice of motion disposed of with these directions.

(D.G.DESHPANDE,J.)

15.12.2004